United States Department of Labor
Employees' Compensation Appeals Board

G.R., Appellant	)	
and	)	**Docket No. 18-1490**
	)	**Issued: April 4, 2019**
DEPARTMENT OF VETERANS AFFAIRS, VETERANS HEALTH ADMINISTRATION, Dayton, OH, Employer	)	

Appearances:
Alan J. Shapiro, Esq., for the appellant[1]
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:
CHRISTOPHER J. GODFREY, Chief Judge
ALEC J. KOROMILAS, Alternate Judge
VALERIE D. EVANS-HARRELL, Alternate Judge

JURISDICTION

On July 31, 2018 appellant, through counsel, filed a timely appeal from a May 29, 2018 merit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act[2] (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

[1] In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.; see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

[2] 5 U.S.C. § 8101 *et seq.*

ISSUE

The issue is whether appellant has met his burden of proof to establish an injury in the performance of duty on January 25, 2013.

FACTUAL HISTORY

This case has previously been before the Board.[3] The facts and circumstances of the case as set forth in the prior Board decisions are incorporated herein by reference. The relevant facts are as follows.

On January 23, 2014 appellant, then a 50-year-old medical administration specialist, filed a traumatic injury claim (Form CA-1) alleging that at 8:30 a.m. on January 25, 2013 he sustained injury due to a motor vehicle accident 25 miles east of Louisville, Kentucky. He did not stop work at the time of the alleged January 25, 2013 employment injury, but he stopped work on November 25, 2013. On the same form, appellant's immediate supervisor checked a box marked "No" indicating that the claimed January 25, 2013 employment injury had not occurred in the performance of duty and noted, "The purpose of the trip was exclusively to explore employment opportunities, [appellant] was not on a work detail." The supervisor indicated that appellant's regular-duty station was the employing establishment medical center and that his regular hours were 7:30 a.m. to 4:00 p.m., Monday through Friday.

In a January 23, 2014 statement, appellant indicated that on January 25, 2013 he was on orders to proceed to a detailed assignment at the employing establishment's Valley Coastal Bend Health Care System facilities in Harlingen and Corpus Christi, Texas. He advised that he was driving in an ice storm near Louisville on January 25, 2013, the first day of his trip, when at approximately 8:00 or 9:00 a.m. he was involved in a motor vehicle accident, which caused his vehicle to roll over four times. Appellant indicated that his injuries, including pain/bruising in his neck and extremities, did not appear severe at the time of the January 25, 2013 accident, and that he continued his trip to the Valley Coastal Bend Health Care System facilities. He noted that, when he returned to work in Dayton, Ohio, he reported the accident to his immediate supervisor and another employee, sought medical treatment from employing establishment physicians, and used annual and sick leave. Appellant asserted that his need for total hip replacement surgery was related to the January 25, 2013 accident.

In a report of contact with a "Date of Contact" of February 6, 2014, it was indicated that, "[Appellant] requested approval to take a trip to Texas to interview for a potential job assignment(s) and early placement out of the Technical Career Field Program [(TCFP)]." The document provided the text of appellant's January 24, 2013 e-mail to several individuals, including his immediate supervisor, which was entitled, "Use of [TCFP] Funds for Final Placement Site Visit." In this e-mail appellant indicated that he wanted to clarify the purpose of his trip after speaking with an individual in the Chief Business Office of the TCFP. He advised that he was going to two locations in Texas, the primary location being in Harlingen, Texas, and the secondary location being in Corpus Christi, Texas, to engage in site visits for permanent placement to

[3] Docket No. 16-0544 (issued June 15, 2017).

complete the TCFP. Appellant indicated that he had already undergone telephone interviews and that the positions in both locations met the final placement criteria for the TCFP.[4]

In a letter dated February 6, 2014, a workers' compensation specialist for the employing establishment indicated that the employing establishment was challenging appellant's claim for a January 25, 2013 injury. She advised that appellant was not in the performance of duty when the alleged work-related injury occurred on January 25, 2013 and that the purpose of his trip to Texas was exclusively to explore employment opportunities. The specialist noted that he was not on a work-detail status from the employing establishment medical center as alleged. She indicated that a 120-day commitment agreement for the TCFP, signed by appellant on December 21, 2012, provided that the employing establishment could not offer him a position at the end of the TCFP, and that he was responsible for finding suitable employment prior to the end of the term of the TCFP.

The specialist attached a copy of a 120-day commitment agreement signed by appellant on December 21, 2012 in which it was noted that his two-year anniversary date as an intern in the TCFP was September 26, 2013. Appellant signed a certification block in which he affirmed that, since his work facility could not offer him a position at the end of the TCFP, he understood that it was his responsibility to find suitable placement prior to the two-year anniversary of the date he was hired into the TCFP. He further affirmed that he agreed to work with the national career field program manager to find placement and that he understood he had to accept or decline a placement offer at least 60 days prior to his two-year anniversary date.

In a February 20, 2014 development letter, OWCP requested that appellant submit additional factual and medical evidence and to complete an attached questionnaire in support of his claimed January 25, 2013 employment injury. On the same date it requested additional information from the employing establishment and asked it to complete an attached questionnaire.

Appellant submitted a March 10, 2014 statement in which he asserted that various documents he was submitting in connection with the statement showed that he was on "approved travel" when he was injured in the January 25, 2013 accident. He indicated that he was driving his private-owned vehicle because a government-owned vehicle was not available for use. Appellant asserted that the January 25, 2013 accident occurred on the most direct route between the employing establishment medical center and the Valley Coastal Bend Health Care System facilities. He indicated that he reported the January 25, 2013 accident to an official at the Valley Coastal Bend Health Care System facility in Harlingen, Texas when he arrived there after the accident.

Appellant submitted a January 18, 2013 e-mail to a TCFP official in which he advised that he had been asked to travel the following week to Corpus Christi, Texas for a site visit. His e-mail was sent in response to a January 18, 2013 e-mail of the TCFP official indicating that a position opening might be announced. In a series of e-mails between appellant and an official with the Valley Coastal Bend Health Care System, dated January 23 and 24, 2013, appellant indicated that his travel to the Valley Coastal Bend Health Care System facilities had been approved by his

[4] Appellant submitted a document which indicated that he provided an expense report to the employing establishment on February 21, 2013.

"chief" and that he would be using TCFP funds for the trip. The official advised that the specialist would be able to meet with him on January 31, 2013 to discuss a position opening at the Harlingen, Texas facility. She indicated that she had no authority to discuss position openings at the Corpus Christi, Texas facility. In a January 24, 2013 e-mail to appellant, which was copied to his immediate supervisor, a TCFP program manager in Atlanta advised that TCFP funds could "be used towards a site visit for permanent placement." In a February 4, 2013 e-mail to his immediate supervisor in Dayton, Ohio, appellant advised that he was home and that he had "an interesting run in with an ice storm … which is why I am going to the [physician] today." He indicated that he would submit a travel authorization request.

A March 28, 2013 e-mail sent to appellant through an automated response system indicates, "You have an Expense Report which has been approved," and lists his immediate supervisor as the "Final Approver." A document lists expenses he incurred for lodging, meals, and mileage for the period January 25 to February 4, 2013 and contains the comments, "Site visit to south Texas for [TCFP] final placement. Shortened trip due to accident and business being done early." The last page of the document indicates that appellant submitted an expense report on February 21, 2013.

Appellant also submitted a Memorandum of Understanding (MOU) signed in March 2013 by appellant, officials of the Valley Coastal Bend Health Care System, and officials of the employing establishment medical center, including appellant's immediate supervisor. The document concerns the prospective relocation of appellant's job from the employing establishment medical center to the Valley Coastal Bend Health Care System effective September 26, 2013. Appellant would begin working as a supervisory medical administration specialist at the Harlingen, Texas facility. An MOU with the heading "Final Placement," indicates that on May 6, 2013 he would be transferred to the position of supervisory medical administration specialist at the Harlingen, Texas facility and that, effective September 26, 2013, he would be permanently placed in the position. In a May 6, 2013 memorandum to the TCFP program manager in Atlanta, appellant indicated that he made a site visit to Harlingen, Texas in January 2013. E-mails from mid-May 2013 show that he made the transfer to the Harlingen, Texas facility on May 6, 2013.

Appellant submitted an undated Kentucky Uniform Police Traffic Collision Report describing the January 25, 2013 motor vehicle accident. He also submitted medical evidence in support of his claim, including a February 26, 2014 report in which Dr. Jarvis Earl, an attending Board-certified orthopedic surgeon, indicated that he was totally disabled from December 4, 2013 to February 28, 2014 and partially disabled from March 1 to 21, 2014.

In a March 21, 2014 letter, the workers' compensation specialist for the employing establishment, who had produced the February 6, 2014 letter submitted earlier, responded to OWCP's February 20, 2014 request for additional information. The specialist advised that appellant was not on an official temporary-duty (TDY) assignment at the time of his January 25, 2013 accident. She indicated that he traveled to Texas for a job interview, as expressed through a January 24, 2013 e-mail in which he noted that he would use TCFP funds for such travel. The specialist advised that, prior to the January 25, 2013 accident, appellant last performed his official duties on January 22, 2013 at his regular-duty station, *i.e.*, the employing establishment medical center. She indicated that he was expected to perform his next official duty on February 4, 2013

at his regular-duty station in Dayton. The specialist advised that appellant was not riding in or driving a government-owned car on January 25, 2013.

In a February 5, 2013 report of contact, appellant's immediate supervisor noted that appellant informed her that he had returned to the Dayton Veterans Affairs Medical Center following a trip to Texas to interview for a job as a part of his attempt to obtain early placement out of the TCFP. The supervisor noted that appellant advised her that he had been involved in a motor vehicle accident on January 25, 2013 while driving to Texas. Appellant further informed her that he had suffered some bruising without serious injury and that he continued with his trip plans following the accident. The supervisor noted, "[Appellant] was not in a detail status, but rather in a travel status."

In a March 29, 2014 statement, appellant responded to the employing establishment's March 21, 2014 letter. He again asserted that he was required by the TCFP to travel to another site for placement and that this fact was supported by the MOU in the record.

By decision dated May 6, 2014, OWCP found that appellant had not met his burden of proof to establish an injury in the performance of duty on January 25, 2013. It determined that the evidence of record failed to support that the claimed injury occurred in the performance of duty as it did not occur in "the course of employment and within the scope of compensable work factors as defined by … FECA." OWCP explained that appellant's January 25, 2013 accident had not occurred while he was on official duty status, but rather occurred while he was engaged in the personal mission of traveling to Texas for a job interview.[5]

On April 21, 2015 appellant, through counsel, requested reconsideration of OWCP's May 6, 2014 decision. He submitted copies of e-mails that were exchanged between him and a TCFP national program manager. In an April 8, 2015 e-mail to the coordinator, appellant referred to himself as a TCFP intern in the class of 2011. He advised that in January 2013 he was traveling to Texas for a site visit on a short detail and that, while he was in Texas, he was also going to interview for a permanent placement position with the Valley Coastal Bend Health Care System. He asked the coordinator to provide an opinion regarding whether he was in the line of duty while traveling to Valley Coastal Bend Health Care System facilities for a site visit. In an April 9, 2015 e-mail, the coordinator replied, "As long as you were on official travel orders for a site visit as part of your two-year training program, I would consider that on duty as for another other [sic] official trip you would take for [Valley Coastal Bend]."

By decision dated November 25, 2015, OWCP denied modification of its May 6, 2014 decision finding that appellant had not established an injury in the performance of duty on January 25, 2013. It found that appellant's activities on January 25, 2013 had not occurred in the course of his employment or arising out of his employment.

[5] In a letter dated February 26, 2015, appellant, through counsel, requested reconsideration of OWCP's May 6, 2014 decision. He submitted a January 23, 2015 medical report of Dr. Earl. By decision dated March 5, 2015, OWCP denied appellant's request for further review of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

Appellant appealed OWCP's November 25, 2015 decision to the Board and, by decision dated June 15, 2017,[6] the Board set aside OWCP's November 25, 2015 decision and remanded the case to OWCP for further development. The Board indicated that it was unable to make a determination regarding appellant's claimed January 25, 2013 employment injury because there was conflicting evidence in the record as to whether appellant's January 25, 2013 accident occurred while he was on an employment-related site visit or whether he was on a personal job hunting trip. It noted that a workers' compensation specialist for the employing establishment indicated that appellant was not on a work-detail status from the employing establishment Medical Center as alleged and that he was not on an official TDY or travel assignment at the time of his January 25, 2013 accident. However, although appellant's immediate supervisor noted that on January 25, 2013 appellant was "not in a detail status," she also made the contradictory statement that he was "in a travel status."

The Board also indicated that a TCFP national program manager provided evidence regarding the nature and purpose of appellant's January 2013 trip to Texas which contradicted evidence from appellant's immediate supervisor and the workers' compensation specialist for the employing establishment.[7] The Board noted that further uncertainty regarding the relationship of appellant's trip to his employment was created by the fact that expenses for his trip were reimbursed by the employing establishment. The record reflects that a TCFP official in Atlanta advised appellant on January 24, 2013 that he could use TCFP funds for his trip to Texas, and that his request for reimbursement of expenses for the period January 25 to February 5, 2013 was later approved by his immediate supervisor. The Board directed OWCP to issue a *de novo* decision regarding appellant's claim after carrying out further development with respect to the above-described conflicting evidence.

On remand OWCP sent a July 20, 2017 development letter to the employing establishment which posed various questions regarding appellant's travel to Texas in January 2013. It asked whether official agency travel orders were issued for appellant's travel to Texas in January 2013. If such orders were issued, the employing establishment was to provide a copy to show the dates that appellant was authorized to be in official travel status. OWCP noted that a TCFP official advised that TCFP funds could be used towards a "site" visit for permanent placement and indicated that there was documentation in the file showing that appellant was reimbursed for his travel to Texas. It asked the employing establishment to verify if the reimbursement occurred due to appellant being in official travel status or for some other reason. OWCP afforded the employing establishment 30 days to respond.

In an August 16, 2017 letter, a benefits specialist for the employing establishment indicated that she was confused by appellant's case because it had been denied on May 6, 2014 and it

[6] *Supra* note 3.

[7] In an April 8, 2015 e-mail to the TCFP national program manager, appellant advised that in January 2013 he was traveling to Texas for a site visit on a short detail and that, while he was in Texas, he was also going to interview for a permanent placement position with the Valley Coastal Bend Health Care System. He asked the TCFP national program manager to provide an opinion regarding whether he was in the line of duty while traveling to the Valley Coastal Bend Health Care System facilities for a site visit. In an April 9, 2015 e-mail, she replied, "As long as you were on official travel orders for a site visit as part of your two-year training program, I would consider that on duty as for another other [sic] official trip you would take for [Valley Coastal Bend]."

appeared that a reconsideration request was denied in 2015. She indicated that the employing establishment had not received anything to show the case had been reopened and she noted, "I am resending the information that is already in the case file stating [appellant] went to Texas for a job interview according to documents. What he told the TCFP was not something we were privileged to. He stated it was an interview, more than once." The benefits specialist submitted documents which were already in the record, including the February 5, 2013 report of contact from appellant's immediate supervisor, the 120-Day Commitment Agreement for the TCFP signed by appellant on December 21, 2012, and the February 6 and March 21, 2014 letters from a workers' compensation specialist for the employing establishment.

By decision dated September 21, 2017, OWCP found that appellant had not met his burden of proof to establish an injury in the performance of duty on January 25, 2013. It noted that all of the evidence submitted by the benefits specialist for the employing establishment in August 2017 had already been considered in prior decisions and did not establish that appellant was on official duty status during his trip to Texas in January 2013. OWCP noted, "[A]fter after a thorough review of all evidence, your claim for compensation is denied because the fourth basic element, performance of duty, has not been met. Specifically, your case is denied because the evidence is insufficient to establish that the injury and/or medical condition arose during the course of employment and within the scope of compensable work factors…."

On October 3, 2017 appellant, through counsel requested a telephonic hearing with a representative of OWCP's Branch of Hearing and Review. During the hearing, held on March 15, 2018, counsel asserted that on January 25, 2013 appellant was on travel status which was approved by employing establishment officials and the TCFP program manager.[8]

By decision dated May 29, 2018, OWCP's hearing representative affirmed OWCP's September 21, 2017 decision. She determined that appellant failed to establish that he sustained an injury in the performance of duty on January 25, 2013. The hearing representative found that, at the time of his January 25, 2013 accident, appellant was on a "personal job hunting trip" and was not on approved travel status.

LEGAL PRECEDENT

FECA provides for the payment of compensation for "the disability or death of an employee resulting from personal injury sustained while in the performance of duty."[9] The phrase "sustained while in the performance of duty" has been interpreted by the Board to be the equivalent of the commonly found prerequisite in workers' compensation law of "arising out of and in the course of employment."[10] The phrase "in the course of employment" is recognized as relating to the work situation, and more particularly, relating to elements of time, place, and circumstance. To arise in the course of employment, an injury must occur at a time when the employee may reasonably be said to be engaged in the master's business, at a place where he may reasonably be

[8] Prior to the hearing being held, appellant submitted several documents which were already in the case record.

[9] 5 U.S.C. § 8102(a).

[10] *Charles Crawford*, 40 ECAB 474, 476-77 (1989).

expected to be in connection with the employment, and while he was reasonably fulfilling the duties of his employment or engaged in doing something incidental thereto."[11] This alone is insufficient to establish entitlement to benefits for compensability. The concomitant requirement of an injury "arising out of the employment" must be shown, and this encompasses not only the work setting, but also a causal concept, the requirement being that the employment caused the injury.[12] In order for an injury to be considered as arising out of the employment, the facts of the case must show some substantial employer benefit is derived or an employment requirement gave rise to the injury.[13]

The Board has held that, where an employee is on travel status or a TDY assignment, he or she is covered by FECA 24 hours a day with respect to any injury that results from activities essential or incidental to his or her temporary assignment.[14]

ANALYSIS

The Board finds that the case is not in posture for decision.

In its June 15, 2017 decision, the Board set aside OWCP's November 25, 2015 decision and remanded the case to OWCP for further development because there was conflicting evidence in the case record as to whether appellant's January 25, 2013 accident occurred while he was on an employment-related site visit or whether he was on a personal trip for the purpose of finding alternate employment. The Board provided a detailed description of the evidence in the case record which conflicted, but OWCP failed to carry out adequate development of these specific matters upon remand. OWCP sent a July 20, 2017 development letter to the employing establishment which posed various questions regarding appellant's travel to Texas in January 2013. Despite receiving a response from the employing establishment which did not fully answer the posed questions, OWCP did not conduct any further development of the evidence.[15]

Under FECA, although it is the burden of an employee to establish his or her claim, OWCP also has a responsibility in the development of the factual evidence, particularly when such evidence is of the character normally obtained from the employing establishment or other government source.[16]

Therefore, the case must be remanded to OWCP in order for it to carry out the development originally directed by the Board in its June 15, 2017 decision. As delineated above, the Board's

[11] *Mary Keszler*, 38 ECAB 735, 739 (1987).

[12] *Eugene G. Chin*, 39 ECAB 598, 602 (1988).

[13] *See id.*

[14] *D.R.*, Docket No. 16-1395 (issued February 2, 2017); *T.C.*, Docket No. 16-1070 (issued January 24, 2017).

[15] In an August 16, 2017 letter, a benefits specialist for the employing establishment merely indicated that appellant had indicated that he went to Texas for an interview. She attached several documents which were already in the case record and which had previously been considered by OWCP.

[16] *Willie A. Dean*, 40 ECAB 1208, 1212 (1989); *Willie James Clark*, 39 ECAB 1311, 1318-19 (1988).

June 15, 2017 decision described in detail the conflicting evidence in the case record pertaining to such matters as whether appellant was on travel status in January 2013, and whether his trip to Texas was approved as work related by employing establishment officials or the TCFP program manager. After carrying out this development, OWCP shall issue a *de novo* decision regarding appellant's claim for a January 25, 2013 employment injury.

CONCLUSION

The Board finds that the case is not in posture for decision.

ORDER

IT IS HEREBY ORDERED THAT the May 29, 2018 decision of the Office of Workers' Compensation Programs is set aside, and the case is remanded to OWCP for further proceedings consistent with this decision.

Issued: April 4, 2019
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge
Employees' Compensation Appeals Board